Katherine Moneypenny, Widow, } APPEL'

John Brown, and *Iſabel* his Wife, } RESP'

The Reſpondents CASE.

GEORGE MONCRIEFFE, Deceaſed, having no Children, was (when he was *in Extremis*) much Importuned by the *Appellant* and her Friends, to make a Will in the very laſt Hour of his Life; which Importunities ſo much prevailed upon him (who was willing to die in Peace) as to give Directions for making a Will, by which, after the giving of a few trifling Legacies, he diſpoſed of all his other Goods and Chattels, of a very conſiderable Value, to the *Appellant*, whom he made ſole Executrix of his ſaid Will; and by this pretended Will, the *Reſpondent*, *Iſabel* (the only Surviving Siſter of the ſaid *George Moncrieffe)* was entirely cut off from any Share of his Eſtate, not being any ways taken Notice of in the Will, tho' ſhe was always in good Terms with the ſaid *George*, her Brother; and cannot believe but that if he had been left to his Liberty, but he would have left her a very conſiderable ſhare of his Eſtate.

After the Methods that had been uſed to procure Directions for making this Will, the ſame being ſhort, was quickly diſpatched by one *Robert Watſon*, who was a Merchant, and one of the *Appellant*'s Friends; but it could not be ready to be Executed 'till the ſaid *George Moncrieffe* was Expiring; and tho' he attempted to Sign it, yet he was ſo Weak, that he was not able to compleat his Subſcription, which the ſaid *Robert Watſon* very officiouſly ſupplied, by leading the ſaid *George*'s Hand to make out the laſt Part of his Subſcription; and that laſt Part varies from his ordinary Subſcription, not only in the Writing, but in the manner of Spelling his Name.

The *Reſpondents* therefore ſought Relief before the Lords of Council and Seſſion in *Scotland* to avoid the ſaid Will, as not being duly Executed according to the Laws and Statutes there in Force: And upon the Examination of Witneſſes, it plainly appeared that the ſaid Will was not duly Signed by the Teſtator, nor Executed according to Law; for tho' there were Four Subſcribing Witneſſes to the Will, yet Three of them could not poſitively Depoſe that they ſaw the pretended Teſtator Sign the Will: And the ſaid *Robert Watſon*, who was the only Witneſs who was Poſitive that he ſaw him Sign it; admits, that he took him by the Sheckle-Bone (*i. e.* the Wriſt) and aſſiſted him in the Writing the laſt Syllable of his Name.

The ſaid Cauſe coming before the Lords of Council and Seſſion, they, by their Interloquitor, or Sentence, found the Reaſons of Reduction, or Avoidance of the ſaid Will to be relevant and proven, *viz.* That the Teſtament was not Subſcribed in the Terms of the Act of Parliament, and Finiſhed by the Deceaſed himſelf, without Aſſiſtance; and therefore Reduced or made Void the ſaid Will.

The Witneſſes, upon Oath, having declared they did not ſee the ſaid *George* Sign the pretended Will, the *Appellant* then offered to prove, That he owned the Subſcription, and declared the ſame to be his, which by the Law of *Scotland* is equivalent to the Proof of actual Signing; the Lords were ſo Indulgent to the *Appellant* (who pretended that the ſaid *George*, Deceaſed, not only owned the Subſcription, but deſired the Witneſſes to Sign it) that upon her Application, they allowed the Witneſſes to be re-examined upon that Point, but the Witneſſes all depoſed they did nor hear him own his Subſcription; and thereupon the Lords upon the Third Day of *February* laſt, affirmed their ſaid Decree, and vacated the ſaid Will.

The *Appellant* now Appeals againſt the Decree, and complains of the Injuſtice thereof for theſe Reaſons:

Obj. 1. That the ſaid Deceaſed gave Directions to Mr. *Watſon* to write his Will to the Effect as it now ſtands, and after writing of it, it was read to, and approved of, by him; and tho' an unexpected Weakneſs ſeized him ſo as he was not able without Help to compleat his Subſcription, yet the Support given him was only to prevent the ſaid *George*'s Hand from Wavering, and keep the Subſcription in right Line, and was what by Law might be given.

Anſwer. That whatever Directions the ſaid *George* Deceaſed gave for writing the ſaid Will, it was only the Effect of the Importunity of the *Appellant* and her Friends, and no doubt the ſame Importunity might prevail with him to declare his Satisfaction with the Will when read to him, tho' probably he (being ſo near Death) neither heard nor underſtood what was read, for he died in a Quarter of a Hour after the ſaid pretended Will is ſaid to be executed; and tho' probably the ſaid *George* took the Pen in his Hand in order to Sign it, yet whatever he intended, he had not Time to compleat it, ſince *Watſon* was obliged to Guide his Hand, and wrote the laſt Syllable of his Name; and the Law does not regard Intention as ſufficient tho' never ſo carefully expreſs'd, if that Intention was never reduced to a compleat and formal Act; and this Teſtament can never be thought to be compleated by the Teſtator ſince the Subſcription was finiſhed by another Hand, and the laſt Part of it appears to be of a different Hand more regularly written than the reſt of the Subſcription, and the Name is ſpelled quite different from the Teſtator's ordinary Subſcription, and in the Way and Manner it is written by the ſaid *Watſon* in the Body of the Will; and beſides this Will is not proved to be Executed according to Law, becauſe the Witneſſes neither ſaw the Teſtator Sign it, neither did they hear him own his Subſcription after he had Signed it, and without One of theſe, by the Law of *Scotland*, no Will or Deed can be compleat.

The Fifth Act of the Parliament, 1681.

Obj. 2. Tho' the nice Rules eſtabliſhed for compleating of Deeds had not been exactly obſerved, yet Wills (being generally made on Death-Bed) by the Laws of all Nations, meet always with the moſt favourable Interpretation, eſpecially in this Caſe where the Will contains a moſt juſt and equitable Diſtribution of the Teſtator's Goods and Chattels.

Anſwer. That however favourable Interpretation Wills may have when compleated, and once ſolemnly made, yet it is abſolutely neceſſary that the Rules of Law in the Execution of them ſhould be exactly obſerved, and there is no Place in ſuch Caſes for Favour; becauſe the leaſt deviation from Law, tho' in a Caſe otherwiſe favourable, is pernicious in the Example; nor can this Will be ever thought a juſt Diſtribution of the Teſtator's Goods and Chattels, ſince the *Reſpondent Iſabel* is intirely omitted who was the Teſtator's only ſurviving Siſter, and if the Will be ſet aſide the *Appellant* (who was the Wife of the pretended Teſtator) inſiſts that ſhe is Intitled to one half of the Perſonal Eſtate, and has claimed the ſame in her Anſwer to a Suit commenced by the *Reſpondents* for an Account of the Perſonal Eſtate: And the Deceaſed has made a very good Proviſion for her by way of Jointure out of the Real Eſtate.

Wherefore the Reſpondents *humbly Pray the ſaid Appeal may be Diſmiſſed with Coſts.*

THO. LUTWYCHE.
JAMES GRAHAM.

Si quæramus an valeat Teſtamentum, imprimis animadvertere debemus; an is qui fecerit Teſtamentum habuerit Teſtamenti factionem: deinde ſi habuerit, requiremus an ſecundam regulas Juris (civilis) teſtatus ſit. L. 4. F. *Qui Teſtament. facere poſt.*